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IN THE

Supreme Court of the United States

October Term, 1942.

No. 955

FRANK VALENTI, *Petitioner,*

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

I. MAURICE WORMSER,
EDMUND CLYNES,
Counsel for Petitioner.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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POINT I.

The judgment below is inconsistent with the determination in other Circuit Courts of Appeals to the effect that facts creating mere suspicion of guilt will not support a conviction of conspiracy 7

POINT II.

The Trial Court committed reversible error in receiving prejudicial testimony of government agent Maguire, over appellant's objection and exception, that Maguire stated to petitioner's brother and son upon the occasion when they were arrested: "Is this a nice place for you two kids to be? I would give a thousand dollars to have your father where you are. I do not get my fun in arresting nineteen year old boys 8

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v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Frank Valenti, defendant, respectfully prays for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review a judgment of that Court entered on March 22nd, 1943. (R. 291.)

A.

Summary of Matter Involved.

The defendant was convicted of conspiracy to violate various sections of the Internal Revenue Code and was sen-

tenced to imprisonment and a fine (R. 804). The indictment charged defendant and others with having conspired to violate sections of the Internal Revenue Code from January 15, 1935, until August 31, 1941. Four defendants were found guilty, four were acquitted, seven pleaded guilty before trial and one was discharged at end of government's case.

Petitioner was charged in *three* overt acts.

The *second* overt act, set forth in the indictment, charged that in 1935 he was arrested at a still with one Carl Dimino (FF. 57-83; 188-200). Petitioner was discharged by U. S. Commissioner and defendant Dimino was absolved of present conspiracy by Court in instant case at end of Government's proof.

The *fifth* overt act charged petitioner and his wife with having a still in their possession February 9, 1937 (FF. 21, 22). Both petitioner and his wife were tried, convicted and sentenced for this offense (F. 735). The evidence relied upon by the Government convicted petitioner as a landlord and not as an operator of the illicit still (FF. 206, 207, 212-216).

The *eleventh* overt act charged petitioner, together with defendants, Frank Dimino and John De Vito, with riding in an automobile in the City of Jamestown, New York, in July 1939, containing equipment which could be used in an illicit distillery (F. 27) (FF. 218-244). No charges were then made for violation of Internal Revenue Laws.

During 1940, agents of Internal Revenue Department trailed various defendants and proof was introduced that

cars of various defendants were parked near petitioner's home or in vicinity of a reputable Club frequented by various defendants (FF. 398, 436, 438, 490, 491, 552, 553). Throughout this period petitioner's car was never seen at any place where a seizure had occurred or where any was subsequently made (309). Practically all defendants were his relatives. [Judge Clark erroneously refers to contact with one Lo Tempio not in conspiracy—the person being Joseph Valenti, brother of petitioner.] (F. 286—fol. 287.)

The government charged that a minor repair job (263-264) was done on petitioner's car at a garage where other cars of co-conspirators were serviced (255-281). The government also relied heavily upon the fact that petitioner had an unlisted telephone number and one call was made from the home of Conti, the younger (acquitted by jury), in Jamestown to the Rochester home of petitioner. Furthermore, on September 8, 1937, an illicit still was seized at East Eden, New York; and from the bill fold of the alleged operator, who is not mentioned in the present indictment, a card was taken containing on its back the petitioner's telephone number in writing (247, 248).

Jurisdiction.

Petitioner was convicted of violating Section 88 of Title 18 U. S. C. A. This Court's jurisdiction rests on Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 357). Also Rule XI of Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

Questions Presented.

1. Whether the Court below applied the correct rule in holding that it was for the jury to say whether petitioner was a member of the conspiracy.

2. Whether reversible error was committed when the Government witness, Agent Maguire, testified that, while talking to petitioner's brother and son upon the occasion of their arrest, he said, "I would give a thousand dollars to have your father where you are," etc.

Reasons Relied on for Granting Writ.

1. Petitioner contends that the decision of the Circuit Court of Appeals is in conflict with the decision of the Fifth Circuit in

Kassin vs. U. S., 87 Fed. 2nd 183, 184.
U. S. vs. Copeland, 90 Fed. (2nd) 78.

2. An important rule of evidence was nullified, and the Circuit Court of Appeals did not follow the New York Court of Appeals ruling in People vs. Robinson, 273 N. Y. 438, a case closely in point.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

FRANK VALENTI,
Petitioner,
By I. MAURICE WORMSER, and
EDMUND CLYNES,
Counsel for Petitioner.